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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 TOMITA TECHNOLOGIES U.S.A.,
5 LLC and TOMITA TECHNOLOGIES
6 INTERNATIONAL, INC.,

7 Plaintiffs,

8 v.

11 CV 4256 (JSR)

9 NINTENDO CO., LTD. and
10 NINTENDO OF AMERICA, INC.,

11 Defendants.

12 -----x

13 New York, N.Y.
14 September 9, 2011
15 5:20 p.m.

16 Before:

17 HON. JED S. RAKOFF,

18 District Judge

19 APPEARANCES

20 STROOK & STROOK & LAVAN
21 Attorneys for Plaintiffs
22 BY: KENNETH L. STEIN
23 ALEXANDER SOLO

24 KAYE SCHOLER
25 Attorneys for Defendants
BY: JAMES S. BLANK
STEPHEN J. ELLIOT

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1 (Case called)

2 THE COURT: Good afternoon. We're here on the
3 defendant's motion to transfer venue. The question is whether
4 it should remain in this Court or be transferred to the
5 District of Washington.

6 My preliminary view is that the critical question on
7 this motion is whether Tomita's incorporation in New York only
8 months ago was in some sense artificial or an exercise in
9 prospective forum shopping or whether it had an impendent
10 legitimate basis. If it's the latter, then it seems to me the
11 strong presumption in favor of plaintiff's choice of forum
12 would be a weighty factor against the motion; not dispositive,
13 but significant. It seems to me that, on the other hand, if it
14 was the former, a sham in the sense of artificial for the
15 purpose of forum shopping, then the balance of conveniences may
16 tip in favor of the transfer.

17 Many of the factors that have historically been
18 considered by the courts in considering a transfer motion, it
19 seems to me with every passing year of less relevance, for
20 example, the location of documents. The location of documents
21 today is in computers whose physical location is almost a total
22 irrelevancy. The documents can be obtained through pressing
23 some buttons anywhere in the world once access is granted.

24 In this case, the convenience of the parties, although
25 not irrelevant, is perhaps not a major factor -- I shouldn't

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1 say the convenience of the parties, the convenience of
2 witnesses, to the extent they will have to travel from Japan.
3 The truth of the matter is that depositions can be held
4 anywhere, the location of the litigation doesn't control
5 necessarily where the depositions are held. This Court could
6 well order that depositions be held in Japan, assuming it was
7 consistent with Japanese law.

8 So we're talking about, in terms of convenience of
9 witnesses, we're talking about the trial of the case. Since
10 95 percent of all federal civil cases settle, that is a minor
11 factor. Plus, here we're talking about, so far as the Japanese
12 witnesses are concerned, a difference of maybe a few hours on
13 an airplane at the very start of the trial and at the very end,
14 so that would not, in this Court's view, would be a very
15 material factor.

16 I'm not going to go through all the factors, some are
17 more important than others, but it does seem to me that what
18 looms largest is the question of whether the location of the
19 plaintiff in the Southern District of New York was done for any
20 other purpose but to bring this litigation. Defense counsel
21 claims that was his real purpose, barring that, that it has no
22 other material purpose that they can discern. Plaintiff's
23 counsel argues otherwise. We may have to have an evidentiary
24 hearing, if it this issue controls. But having said that, let
25 me hear first from moving counsel.

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1 MR. BLANK: Thank you, your Honor.

2 Let me address the point that you view as looming
3 large here. To begin with, there are two plaintiffs, there is
4 Tomita International and then there is Tomita -- what I'll call
5 Tomita U.S. And your Honor was referring to whether in fact
6 Tomita U.S.'s formation --

7 THE COURT: Well, the other company is in Japan.

8 MR. BLANK: Correct, the other company is in Japan.

9 THE COURT: But no one moved to transfer this case to
10 Japan.

11 MR. BLANK: Correct. Tomita U.S. -- the timeline
12 suggests that it was formed here at least in part for creating
13 the appearance that this particular district is convenient for
14 it.

15 THE COURT: What would be the motive for that?

16 MR. BLANK: The motive for it potentially could be
17 that their counsel is located here.

18 THE COURT: Well, the fact --

19 MR. BLANK: And their counsel doesn't want to litigate
20 the case outside of New York. It's convenient for its counsel.

21 THE COURT: Is this their regular counsel?

22 MR. BLANK: I don't know. It can't be the regular
23 counsel, the company is only four months old. So the company
24 was formed a month after the product at issue here, that
25 Nintendo 3DS was released on March 27. The company was formed

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1 less than a month later and the lawsuit was brought two months
2 after that. So they don't -- I don't believe they have any
3 regular counsel.

4 The record is clear that they have no employees here.
5 They have -- their business, quote, unquote, is licensing and
6 commercialization of Mr. Tomita's patents. There's no evidence
7 of what that business actually is other than the filing of this
8 lawsuit, or whether that business has manifested itself in any
9 way at all. It has no employees here. So where the record is
10 right now is what I said.

11 But even going to the point of the deference to be
12 given to plaintiff's choice of forum, if it was here for
13 legitimate purpose, where -- and the Court is very clear on
14 this point -- where the locus of operative facts is not New
15 York, which is this case, and where there is no material
16 connection between plaintiff's claims and Southern District of
17 New York, then the deference given to plaintiff's choice of
18 forum is significantly diminished.

19 THE COURT: Where do you say the locus is?

20 MR. BLANK: The locus is Japan and the Western
21 District of Washington.

22 THE COURT: So if the locus is, in my hypothetical,
23 Kentucky, and someone with very modest ties to New York brings
24 an action in New York and the other side says send us to
25 Kentucky because that's really where the heart of all this

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1 occurred, that's one thing. But you're not asking that, you're
2 saying, and they're saying, too, to some degree, everyone seems
3 to agree the locus is in Japan, which makes some sense,
4 although it files an American patent which is a strong factor
5 why both sides would want a U.S. court to decide this dispute.
6 But my point is I'm not sure that my previous cases on this
7 point and other cases with other judges are really quite
8 addressing what you're talking about, because no one is asking
9 that this case be sent to Japan.

10 MR. BLANK: That's correct. But I would submit that
11 the locus of operative facts is Japan and the Western District
12 of Washington, which is where Nintendo of America's
13 headquarters is located.

14 THE COURT: When I said the District of Washington, I
15 meant the Western District of Washington. I'm not sure what
16 the other districts of Washington are.

17 MR. BLANK: I think there's an Eastern District of
18 Washington.

19 But Nintendo of America, based in the Western District
20 of Washington, is the company that sells, markets and
21 distributes the Nintendo 3DS in North America, including in
22 Japan. As a result, there are, and we have identified, three
23 witnesses from Nintendo of America.

24 In addition, as you noted, we have identified
25 witnesses in Japan, as have they, who are employees of Nintendo

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1 Company Limited in Japan, and it is a resident, who is their
2 key witness and their only witness that they have identified
3 that has any --

4 THE COURT: But I guess the point I wanted to make
5 before, maybe you want to address it, the historical list of
6 factors -- which all of us, including this Court, certainly
7 cite by rote every time that we issue an opinion on a 1404
8 transfer motion -- really was formulated at a time when travel
9 was arduous, when the physical location of documents,
10 witnesses, et cetera, was really important.

11 And there still may be cases, some of the cases that
12 this Court gets on diversity involving persons of limited
13 means, witnesses of limited mobility and so forth, will fit
14 that pattern. But when you're talking about international
15 corporations, these things really become somewhat artificial.
16 They're not entitled to no weight, but they're not exactly
17 earth shaking in their significance, which is why I focused on
18 the first issue.

19 For example, if this case were much further along than
20 it is, I would say that the last factor that is usually cited,
21 which is judicial economy and judicial efficiency, would
22 overwhelm all the factors, because the importance of getting a
23 case to finality when it's already been fully litigated in one
24 district and the importance of having a court that is fully
25 familiar with the issues when it's already been fully litigated

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1 in this day and age is a vastly more important factor than
2 those other factors that once used to loom large and now
3 seem -- to this court, seem to loom much less large.

4 But of course in this case you promptly brought this
5 motion early on in the case, so that factor is much less
6 important.

7 MR. BLANK: Right. I would agree with your Honor that
8 the location of documents is pretty much in every case not a
9 significant factor anymore.

10 THE COURT: To go back to the point that I mentioned,
11 as to witnesses, since the Court has the power to order
12 depositions anywhere, and I am usually of the view that
13 convenience of witnesses should loom large in determining where
14 a deposition should be taken, really the only inconvenience is
15 going to be traveling to trial where, for the Japanese
16 witnesses, is going to be a few extra hours for one day coming
17 in and one day coming out. And that's not zero, but that's not
18 exactly the inconvenience of the century either.

19 MR. BLANK: I think that's fair in part.

20 THE COURT: Well, I try.

21 MR. BLANK: First of all, the difference in travel
22 time can be significant, depending on the route that's taken
23 and the flights available, but the more important point is that
24 the Nintendo witnesses who have been identified -- and we
25 identified four technical witnesses to testify on the structure

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1 and operation of the Nintendo 3DS's cameras. They identify
2 seven additional NCL witnesses who allegedly attended a meeting
3 in 2003 with Mr. Tomita and others, who, in their initial
4 disclosures, they listed each of those gentlemen.

5 So the issue here is not just the travel time and the
6 additional time zones involved, but it's the fact that those
7 witnesses can work out of Nintendo's headquarters during trial
8 in the Western District of Washington, where they can easily
9 communicate and continue to do their work with much less
10 business disruption to Nintendo than if they were here.

11 And we put in evidence --

12 THE COURT: Sorry, maybe I am not sufficiently
13 particular with how modern business men and business women
14 operate. My image is of folks who are regularly traveling all
15 over the world and who are able to conduct their business day
16 and night because they bring a laptop with them.

17 Am I misunderstanding something?

18 MR. BLANK: No, you're not misunderstanding the
19 communication, but the people that these NCL witnesses
20 typically communicate with are at Nintendo in Redmond,
21 Washington. And they could work there, be given offices there,
22 and communicate directly with these people during the course of
23 the trial.

24 THE COURT: Well, first of all, hopefully during the
25 course of trial they might want to actually focus on trial.

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1 But secondly, are you representing to me that those individuals
2 don't regularly travel on business?

3 MR. BLANK: Those particular individuals don't. They
4 are relatively, for the most part, low-level engineers who do
5 not travel on business and do not speak English, and who
6 primarily --

7 THE COURT: Of course the English part is neither here
8 nor there because most of the people in Washington I suppose do
9 speak English and don't speak Japanese. And of course in New
10 York, we don't speak either language. But I get your point.

11 Let me hear from your adversary.

12 MR. BLANK: May I address one other point?

13 THE COURT: Yes.

14 MR. BLANK: As to the deference point, the
15 underpinning of that factor is that the -- inherently that the
16 plaintiff has decided for -- sorry, the non-moving party has
17 decided for itself that this is the more convenient district
18 for it or forum for it, and therefore the deference is given to
19 it.

20 However, when you look at -- that's why it's important
21 that the fact that here in this case there are no material
22 operative facts that occurred in the Southern District of New
23 York, and there are no material witnesses here. So that's why
24 the case is -- irrespective of whether the operative facts are
25 in Japan or in the Western District of Washington, they're not

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1 here. And because they're not here, that's why there are no
2 witnesses here other than purportedly Mr. David who is not a
3 material witness in any event. And the company has no
4 employees here, no business operations here, other than the
5 filing of this lawsuit. That's why, in this case, that the
6 deference should be significantly diminished, because this is
7 not the locus of operative facts. So I wanted to make that
8 final point.

9 THE COURT: I thought that was the point you were
10 making earlier, but it's well stated and worth making again.

11 Although you have correctly stated what the case law
12 says is the reason for the deference given plaintiff's choice,
13 in fact I think if you really look behind those cases and parse
14 out why cases went one way in one motion and another way in a
15 different motion, to the extent that a motion to transfer looks
16 like a motion to derail or delay an otherwise efficient
17 litigation, it tends to be viewed with disfavor. To the
18 extent, by contrast, that the bringing of a case in a
19 particular district looks like forum shopping, a motion to the
20 transfer is often viewed very favorably.

21 So while you correctly state, as you should, what the
22 ostensible law is, if you will, I think a more realpolitik view
23 of it is no Court looks favorably on forum shopping and no
24 Court looks favorably on tactical delay. So I think those have
25 to be factored in as well.

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1 So let me hear from your adversary.

2 MR. BLANK: Thank you, your Honor.

3 MR. STEIN: Good afternoon.

4 The reason why --

5 THE COURT: Who incorporated -- what law firm
6 incorporated Tomita here?

7 MR. STEIN: I'm not sure if it was -- it was not us.
8 It was not Strook. It was not our firm. I'm not sure which
9 firm it was.

10 THE COURT: The allegation is this case is being
11 brought here because it's convenient for the lawyers. And
12 there are actually cases going both ways as to whether that's a
13 relevant factor to be considered one way or the other. But one
14 wonders why this case was brought here. What does this case
15 have to do with New York?

16 MR. STEIN: The reason why this case brought in New
17 York is because that's where Tomita U.S.A. is located.

18 THE COURT: And why is Tomita U.S.A. -- it's been here
19 for how long, three months?

20 MR. STEIN: The reason why -- frankly the reason why
21 it's located here is because this is where Clifford David
22 lives, who is the manager of Tomita U.S.A., and is manager.

23 THE COURT: How long has he been the manager?

24 MR. STEIN: Well, since its formation, which has been
25 a few months.

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1 THE COURT: And for what purpose was he hired?

2 MR. STEIN: Well, he is a long-time business associate
3 and friend of Mr. Tomita, who is the principal of Tomita
4 Technologies International. They have been working together
5 for 20 years.

6 THE COURT: So what you're really saying is that
7 Mr. Tomita had a good buddy who he thought he wanted to be
8 their U.S. representative, and that guy happened to live in New
9 York and so incorporated in New York. And now we have this
10 gigantic, one-person home office bearing the mighty name of
11 Tomita Technologies U.S.A. Why should I give any deference to
12 that?

13 MR. STEIN: Well, Tomita Technologies U.S.A. was not
14 formed just for the purpose of this lawsuit, it was formed for
15 the purpose of commercializing Mr. Tomita's technology in the
16 U.S.

17 THE COURT: What does it do in that regard?

18 MR. STEIN: Well, he's been talking to people. I'm
19 not quite at liberty to say too much in open court, assuming it
20 will be subject to confidentiality.

21 THE COURT: You don't have to say anything in open
22 court, but if I don't have any evidence, I have to assume the
23 absence of evidence.

24 MR. STEIN: He is doing other activity other than this
25 lawsuit trying to commercialize the technology, get companies

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1 interested.

2 THE COURT: Has any contract been signed?

3 MR. STEIN: Not to my knowledge, but there have been
4 discussions with other companies.

5 THE COURT: Has any other lawsuit been brought?

6 MR. STEIN: No. Commercialization efforts are not
7 just to enforce the patents.

8 THE COURT: I understand that, but I'm trying to
9 figure out, in terms of anything other than talk, the only
10 thing that happened is this lawsuit has been brought. Yes?

11 MR. STEIN: Well, I think the talk is -- the talks are
12 substantial, meaningful talks which hopefully will lead to
13 commercialization in the U.S., but it's not -- in terms of a
14 hard, concrete event, yes, this lawsuit would be it.

15 THE COURT: Go ahead.

16 MR. STEIN: So they're not just buddies per se, they
17 have been working together on real business ventures.

18 THE COURT: I didn't mean to imply anything, I assume
19 that these are hard-headed business men, not just folks who met
20 at the bar. So I take that for granted.

21 MR. STEIN: Also Nintendo questioned -- in its reply
22 brief questioned whether Mr. David resides in New York. He
23 does. It's been his principal residence for many years now.

24 THE COURT: What about -- wasn't there a suggestion, I
25 don't quite remember, in the papers about Florida being his

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1 residence?

2 MR. STEIN: Well, it's not any more, he moved to New
3 York. I have a declaration from him that we got from Mr. David
4 after the reply brief -- I provided it to Nintendo's counsel
5 yesterday -- in which he states --

6 THE COURT: Let me see it.

7 MR. BLANK: For the record, I object to it.

8 THE COURT: It's always good to object to it for the
9 record.

10 MR. BLANK: I object to it for the record as
11 effectively an improper surreply brief.

12 THE COURT: Denied.

13 MR. BLANK: The declaration is --

14 THE COURT: You tell me when you're through, but in
15 the meantime I want to look at it.

16 MR. BLANK: OK.

17 THE COURT: You go ahead, I'll read it while you talk.

18 MR. BLANK: The declaration supports assertions that
19 they made in their opposition brief, specifically that
20 Mr. David resides in New York, and that the reason for the
21 formation of the company is because Mr. David resides in New
22 York.

23 We pointed out in our reply brief that there is no
24 evidence of that, as a result I think they felt the need to do
25 something about it. So they got this declaration from him. As

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1 you see, it's dated September 5th. It was provide to me
2 yesterday afternoon about 3:00. It has not been filed with the
3 Court or provided to your Honor until now. Interestingly, it
4 is executed in California, not New York, if you look at the
5 last page. It has a fax header on it from a company called
6 Freeze Frame LLC, being faxed presumably to the Strook firm
7 from California, not New York, and it clearly suggests that it
8 is not a burning issue for Mr. David to travel, and he clearly
9 does travel. And I can say a bunch of other things about it as
10 well, but I'll let you read it first and then respond in due
11 time.

12 THE COURT: Well, all that you were saying, which I'm
13 happy to hear you on, goes to the merits or demerits of this
14 affidavit, but I thought what you wanted to address was why you
15 thought I shouldn't receive it.

16 So as I understand the situation, you had moving
17 papers, you had reply papers. You got two bites at the apple,
18 they got one. So it might have been a good idea, and certainly
19 more consistent with my rules if they called yesterday with you
20 on the phone and said we would like to present it, but they
21 certainly didn't try to file it or to anything with it, they
22 brought it here today. And they gave it to you, you had a
23 chance to look it over and you're about to tell me the hundred
24 reasons why you think it doesn't support their position, so I
25 don't see why in the world I won't receive it, and I will.

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1 Let's go back, and we'll of course hear from defense
2 counsel about this affidavit in a few minutes.

3 MR. STEIN: I would like to make one point about why
4 we obtained it after the reply. Frankly, we didn't think there
5 was an issue regarding whether Mr. David resided in New York
6 because --

7 THE COURT: I think it's really good that you now want
8 to respond to his argument against my receiving it when I have
9 already ruled against him, but if you want to talk me out of my
10 ruling, you can continue. On the other hand, you might want to
11 go back to addressing the merits of the motion.

12 MR. STEIN: As Mr. David states in his declaration, he
13 not only -- Freeze Frame is a company that has. It was in
14 Florida, it moved to New York. He was traveling in California
15 when we got this.

16 He employs 150 to -- through his company, 150 to 200
17 people in New York. Freeze Frame is a seasonal business, so it
18 depends on the season, but not only does he reside here, he has
19 substantial business here.

20 THE COURT: But that's not business we're talking
21 about in this lawsuit.

22 MR. STEIN: Right.

23 THE COURT: In other words, if company X, which had
24 absolutely no connection to New York in my hypothetical,
25 brought a lawsuit in New York and was challenged in a motion to

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1 transfer and the response was well, it's true we have
2 absolutely no connection to New York but our agent has a
3 different business which has a thousand employees in New York,
4 what would that matter? It wouldn't matter at all, would it?

5 MR. STEIN: I only mention it because it further
6 supports the reason that it was brought here is because
7 Mr. David is here, and Mr. David is not only a resident here,
8 he has business here. Your point as to its direct relevance is
9 correct. That's why.

10 THE COURT: Go ahead.

11 MR. STEIN: The bottom line to the first point that
12 you raised is that this isn't a sham. We didn't incorporate in
13 New York to generate venue here. It was incorporated for
14 legitimate business reasons, and that's why we're here.

15 THE COURT: I also don't understand in your affidavit
16 you say: Mr. Tomita suffered a stroke several years ago that
17 left him partially paralyzed on his left side. I anticipate
18 that I will be of vital assistance to Mr. Tomita in connection
19 with this litigation since the logistics and physical demands
20 of being with his lawyers and attending hearings and trial and
21 attending his deposition will be difficult for him. I have
22 been a friend of Mr. Tomita for many years. I know he will
23 feel much more comfortable having me assist him in these
24 activities than a stranger.

25 Well, we come back to the fact we're only talking

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1 about the trial, because the deposition could occur -- in
2 effect this would be a good situation for a deposition in
3 Mr. Tomita's home or nearby if he has a physical disability.

4 And at the trial, Mr. David and Mr. Tomita --
5 Mr. David would almost surely be there for the whole trial, so
6 he could assist Mr. Tomita whether it was in the State of
7 Washington, the State of New York or anywhere else.

8 MR. STEIN: I'm not sure that the only time Mr. Tomita
9 would have to go to court is at trial. It's not uncommon to
10 have a court-ordered mediation or some type of mediation
11 process. There could be other hearings before trial.

12 THE COURT: I never order a mediation. If parties
13 want to be referred jointly for settlement, I'm always happy to
14 do that, but that's when the parties agree on it.

15 MR. STEIN: I have been before courts where mediation
16 was mandatory.

17 THE COURT: There are such courts, and it's your
18 misfortune this is not one of them.

19 MR. STEIN: If we went to -- if the case -- of course
20 it's not whether this Court wants one, the question is
21 whether -- well, maybe that is part of the question. But if it
22 was moved to Washington, it would depend on the judge. There
23 is also often a Markman hearing in a patent case.

24 THE COURT: I'm sure the highlight is a Markman
25 hearing in any case, but usually that's attended only by the

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1 lawyers.

2 MR. STEIN: That is often the case. Sometimes there
3 are evidentiary Markman hearings, sometimes there are other
4 proceedings. So it may be the case that there are other
5 situations in which --

6 THE COURT: Let me ask a question which I'm not sure
7 anyone answered in their papers. What is the average time for
8 a patent case to go from start to completion in the Western
9 District of Washington?

10 MR. STEIN: I had a paper that was authored recently,
11 I forget the person's name, I believe it's on the order of two
12 and a half years that -- the information is there, we could get
13 it.

14 THE COURT: Because in my court it's much faster than
15 that.

16 Let me go back to your adversary for a minute and come
17 back to you in a second. Thank you.

18 MR. BLANK: To respond to your point about the average
19 time in the Western District of Washington, I don't have those
20 statistics in front of me. What I know, and what we pointed
21 out in our papers is the Western District of Washington has
22 adopted local patent rules that do set hard deadlines for all
23 three trial procedures, claim construction, Markman hearing,
24 and there are certain dates out. So there is a structure in
25 place in that court that provides efficiency for patent cases.

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1 As this Court has recognized in prior transfer cases, those
2 types of statistics are not -- may not be particularly
3 meaningful because it depends on which judge you get, like this
4 court.

5 THE COURT: Absolutely correct. But I know the New
6 York side of this. I can only go from general evidence with
7 respect to the Washington side, because no one knows what judge
8 would get the matter. But you know that in my Court we would
9 move this case rapidly.

10 MR. BLANK: Correct.

11 THE COURT: And what defendant would ever want that?

12 Going back to the issue that still seems to me to be
13 very significant, which is the nature of the plaintiff's
14 presence in New York. So on the one hand I think it's clear
15 from the candid responses I received from plaintiff's counsel
16 that so far virtually nothing has happened of definitive
17 importance in New York on the part of Tomita Technologies but
18 the bringing of this lawsuit.

19 On the other hand, let's assume for the moment, at
20 least, that they didn't just incorporate in New York to bring
21 this one lawsuit. That would seem like perhaps odd for them to
22 do. So let's assume for arguendo, for the purpose of my
23 question, that that was the first thing that they did, but
24 they're working on lots of other stuff, none of which has come
25 to fruition, but it's in the works. I take it your view is

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1 well, that's all fine and good in the future, but at least as
2 far as the present goes, they still have virtually no presence
3 here except to bring this lawsuit, so they're not entitled to a
4 lot of weight.

5 But the argument the other way is you got to start
6 your company in someplace sometime, and the happenstance that
7 the first thing they did was bring this lawsuit shouldn't mean
8 they don't have a significant presence in New York if they do
9 have bone fide intentions -- again, just assuming that for the
10 sake of this question -- to do all these other things in New
11 York. So what about that?

12 MR. BLANK: Well, I don't know what -- there's no
13 evidence of what they have been doing other than counsel saying
14 that they have had some discussions. I don't know who they
15 have had those discussions with, whether they're about this
16 specific patent in suit. My position will be there still
17 remains zero evidence other than the bringing of the lawsuit --
18 well, there is zero evidence of any facts or events or conduct
19 on their part that in any way relates to this litigation.

20 THE COURT: I guess I didn't make my question very
21 clear. I think your arguments -- and it may be a winning
22 argument, I don't know -- that their presence in New York other
23 than the mere bringing of this lawsuit here, which is the point
24 at issue here, so to speak, is quite moxie. On the other hand,
25 I'm not sure it's a case of forum shopping. It may be

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1 convenience, and the convenience may be Mr. David's
2 convenience, but it's different from a classic forum shopping
3 situation where you go down to certain counties in certain
4 states and bring your class action. So if it's not forum
5 shopping, do you still win, is my question.

6 MR. BLANK: I believe that we still win.

7 THE COURT: And how do you assess the weight to be
8 given on this hypothetical, the plaintiff has a presence here,
9 it's a new presence, it's not yet a significant presence, but
10 it's a perfectly bone fide presence, the expectation of having
11 a significant presence here, but that hasn't yet happened. Why
12 should we deny them the presumption that's accorded to suing
13 where you have no presence when it just so happened that you
14 have to bring your first lawsuit sometime, and they brought it
15 now?

16 MR. BLANK: Because the presumption doesn't reflect
17 the reality, and the reality is there are two plaintiffs here,
18 and one is located in Japan and has no presence here
19 whatsoever, and its witness is in Japan. And with respect to
20 the U.S. entity or the newly formed New York entity, as it
21 stands right now, that company is merely an exclusive licensee.
22 It is not an indispensable party to this case. Tomita
23 International could have brought this case and had standing
24 without that exclusive licensee. It has no employees.

25 It's only the facts on the ground are such that the

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1 presumption should be significantly diminished because it has
2 no material witnesses. It has no documents. It has had no
3 interactions with any third parties who are to be witnesses in
4 this case. It hasn't entered into any licenses with any third
5 parties which may be relevant in this case. There's no
6 indication that anything real has happened that affects the
7 particular factors in this case other than in a way that tips
8 in our favor.

9 And I want to note about the declaration what it
10 doesn't say. And now they have had ample opportunity to fully
11 consider everything, all of our arguments, and to make certain
12 points. The declaration says that he resides in New York and
13 that the company was formed in New York because he resides in
14 New York. But it doesn't state that the Western District of
15 Washington would be inconvenient for Mr. David or explain why
16 that's the case. It doesn't state that the Western District of
17 Washington would be inconvenient for Tomita as an entity or as
18 a party, i.e., cause any business disruption to it. It doesn't
19 state that the Western District of Washington would cause any
20 economic hardship on Tomita. And most importantly, it says
21 that one of the reasons it was incorporated here is because
22 Mr. David lives here, but it doesn't deny that another reason
23 why it may have been incorporated here was to create the
24 appearance that this forum is more convenient. That would be
25 the easiest thing for him to say. Mr. David could have said in

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1 the declaration that is incorrect. But he doesn't say that.

2 THE COURT: I'm not sure that it fails to say all that
3 you say it fails to say. For example, where it talks about in
4 paragraph 10, which you read before about how Mr. David could
5 be of assistance to Mr. Tomita, that seems to me to be not at
6 all unsimilar to the argument you were making about it would be
7 great for those engineers to be in Washington so that they
8 could have all the office facility available to them.

9 Here what the argument is it would be great for
10 Mr. Tomita to be here, because with his physical disability and
11 my home being here, I, Mr. David, could accommodate him in a
12 way that would take account of his disability. So I'm not sure
13 it's quite the absence of argument that you just posited.

14 MR. BLANK: But paragraph 10 suggests that -- it uses
15 the term Mr. Tomita would be more comfortable with me than a
16 stranger. Is that suggesting that if this case were in the
17 Western District of Washington that Mr. David would not go
18 there to assist Mr. Tomita? That's what I took away from it,
19 but I don't think that's correct. I mean you can ask them, but
20 it doesn't strike me as correct.

21 THE COURT: Do you think if this case were here that
22 Nintendo wouldn't send -- if they thought these engineers were
23 vital to carry on the business activities during the trial
24 wouldn't send someone to assist them?

25 MR. BLANK: They would.

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1 THE COURT: Yeah.

2 MR. BLANK: But they're suggesting --

3 THE COURT: It cuts both ways is my point.

4 MR. BLANK: They suggest in paragraph 10 that he
5 wouldn't.

6 THE COURT: Well, do we have a case management plan in
7 place?

8 MR. BLANK: Yes.

9 THE COURT: When is the trial ready date?

10 MR. BLANK: I believe March 22nd.

11 THE COURT: Assuming arguendo -- and I may know
12 this -- that I transfer the case, I assume that you would agree
13 that that should be conditioned on the parties continuing to
14 adhere to the case management plan until and unless the judge
15 in Washington orders otherwise.

16 MR. BLANK: I would agree to that. I haven't spoken
17 with my client, but if that was the condition, then yes.

18 THE COURT: For these purposes, I think you are
19 authorized to bind your client.

20 MR. BLANK: The answer is yes, because it turns --
21 nevertheless it still is a matter of convenience.

22 THE COURT: The reason I put this is the obvious one,
23 if your motive were delay, you wouldn't have agreed to what I
24 just asked.

25 MR. BLANK: Correct, and I agreed to it.

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1 And I want to make one other point. This patent issue
2 in 2008 -- and again, getting back to the timeline, Tomita
3 U.S. -- Tomita U.S. was not formed around 2008, it was formed
4 three weeks after the Nintendo 3DS was introduced. They say
5 they're in the licensing business, they never came to us after
6 the patent issue, they never came to Nintendo and offered us a
7 license. Instead, three weeks after the 3DS was released in
8 the United States, they just sued us.

9 THE COURT: All right. Let me hear finally from
10 plaintiff's counsel.

11 MR. STEIN: I would like to address a couple of points
12 that were raised when Mr. Blank first talked.

13 In terms of the witnesses, basically they're asking
14 this Court to transfer the case because there are three
15 witnesses on the West Coast. They identified two in
16 Washington, two witnesses in the Western District of
17 Washington, then there was one they identified I think in the
18 reply, might have been the initial disclosures in California.

19 So in terms of the Western District of Washington,
20 there's just two witnesses there. Here we have Mr. David, who
21 will be a witness, and there's also -- they identified two of
22 Tomita's prosecution counsel who are in Washington in their
23 initial disclosures.

24 By the way, they also spoke about the people from
25 Nintendo that we identified in our initial disclosures. Those

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1 aren't necessarily witnesses at trial, those are people who may
2 have evidence that will support our claims or defenses.

3 Mr. Tomita met with --

4 THE COURT: That's of course true, but no one can
5 predict at this stage who will be all the witnesses at trial,
6 so isn't it reasonable to assess the convenience of witnesses
7 based on who the parties have identified as the persons with
8 knowledge?

9 MR. STEIN: It may be. I won't say more about it, but
10 I think at this point the seven people that attended the
11 meeting with Mr. Tomita back in I think 2003, but I would have
12 to double-check, I don't think it's likely that all seven of
13 those people would be a witness at trial. The bigger point is
14 there are just two witnesses --

15 THE COURT: If the trial is in my court, I guarantee
16 you all seven of them will not be witnesses.

17 MR. STEIN: The bigger point there are two witnesses
18 in Washington they have identified. And well, I said it in my
19 motion papers, and they responded that it's not for us to
20 consider the witnesses.

21 THE COURT: Essentially what they're arguing, to pick
22 up on the point you made, is this is a case where neither side
23 can show overwhelmingly that it would be a huge inconvenience
24 one place or the other. So we're operating on a much smaller
25 scale in terms of the degree of inconvenience. But within that

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1 smaller scale, they say they have established, least some
2 material inconvenience, and you have established almost none
3 other than for Mr. David. That's, I think, perhaps part of
4 their argument.

5 MR. STEIN: Well, I think that they have established
6 almost no inconvenience, and perhaps our inconvenience isn't
7 greater, but --

8 THE COURT: That's why I agree with you, that's why I
9 come back to the question of how much weight, if any, that's to
10 be given. That's a winning point if you get the normal heavy
11 presumption in favor of plaintiff's choice. Their argument is
12 it's not even a heavy presumption in this case, they say it
13 should be zilch for the reasons they argue.

14 MR. STEIN: I think that's inconsistent with the
15 cases. I think even a foreign corporation who has no presence
16 in the U.S. and picks a forum, I think the case law says even
17 in that context --

18 THE COURT: It gets modest -- it doesn't get heavy,
19 but it gets modest deference.

20 MR. STEIN: Given even the negligible amount of
21 inconvenience they're talking about in terms of the Western
22 District of Washington, they haven't overcome the presumption
23 that would have been the case even if it was a foreign
24 corporation that filed in New York.

25 The other point we mention is this could be no

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1 surprise -- being brought to court in New York can be no
2 surprise to Nintendo. They have an office here that has 35
3 employees. They downplay what goes on in the office, they
4 downplay it and say it's marketing and promotion. But they
5 don't deny it, they say it doesn't have any relevance.

6 THE COURT: Unless I misremember, there have been
7 major litigations involving Nintendo in New York. I don't know
8 if they were plaintiff or defendant, so I really don't know,
9 but they're no stranger to the courts of New York. But I'm not
10 sure that matters, each lawsuit has to be assessed on its own
11 terms.

12 MR. STEIN: Their activities in New York are not just
13 general business activities, they have business activities
14 directed towards the accused product, the infringing product,
15 the Nintendo 3DS. The developers of the Web site for the
16 Nintendo 3DS are in New York. They have an executive in charge
17 of one aspect of marketing who has a residence in New York.
18 Nintendo lists -- there are documents in the papers, they admit
19 the documents -- albeit, documents aren't important, but even
20 Nintendo admits they have documents relevant to the case in New
21 York. They have identified Tomita U.S.'s prosecution counsel
22 in DC in their initial disclosures.

23 THE COURT: All right. I'm going to take the
24 liberty -- you're again making some excellent points, but I
25 think I have a fair lay of the land. I want to think about

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1 this. I think it is actually a somewhat close case, but I will
2 get you a decision certainly by the end of September.

3 All right. So I thank counsel for both sides for
4 their excellent argument, and we'll take the matter sub judice.

5 MR. STEIN: Thank you, your Honor.

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